

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**ORIGINATING SUMMONS NO. E005 OF 2025**  
**IN THE MATTER OF THE MATRIMONIAL PROPERTIES ACT, 2013**  
**AND**  
**IN THE MATTER OF AND APPLICATION FOR DECLARATION OF**  
**PROPERTY RIGHTS**

**BETWEEN**  
**ANDREAS THOMAS SWOBODA .....CLAIMANT**  
**VERSUS**  
**JACINTA NKATHA MWENDA SWOBODA .....RESPONDENT**

**RULING**

1. In the Originating Summons dated **24<sup>th</sup> April 2025**, the claimant sought, *inter alia*, to have the jointly owned properties apportioned equally between the claimant and the respondent, and for the respondent to be compelled to produce and deposit in court the original title documents, pending hearing and determination of these proceedings.
2. In the supporting affidavit, at paragraph 7, the claimant deposed that among the properties to be apportioned was a four-bedroom oceanfront house at Galu Beach, Tamani area, situated in Diani in Mombasa (sic!).
3. The respondent filed a notice of preliminary objection dated 28<sup>th</sup> July 2025, vide which, through her counsel, she averred that one of the suit properties, which she identified as being situated in Galu Beach, Diani was owned by **Galu Beach House Three Ltd**, a limited liability company and is subject to rules and regulations in the memorandum and articles of association of the said company. That being so, she contended that the division of shares

could only be done under the Companies Act. That being the case, it was urged that the suit is defective, bad in law, and *does not lie*.

4. In her replying affidavit, sworn on an unknown date and filed on 23<sup>rd</sup> June 2025, the respondent, at paragraph 5, conceded that the Runda house could be the subject of these proceedings but denied that the house in Galu Beach (which she described (Galu) **Beach House Three Ltd (Mzuri Beach House)**) could be the subject of these proceedings.
5. The claimant conceded that the Galu Beach House was held by a company, at paragraphs 5 and 26 of the supplementary affidavit that he swore.
6. The preliminary objection was canvassed by way of written submissions. The submissions of the claimant are dated 6<sup>th</sup> October 2025, while those of the respondent are dated 9<sup>th</sup> September 2025. I have considered the respective submissions.
7. Was the preliminary objection rightly taken? The preliminary objection is based on the fact that the Galu Beach property is owned by a limited liability company. Is that, of itself, sufficient to divest the Family Court of jurisdiction? I will first look at the nature of a preliminary objection.
8. Law, JA, in the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, said as follows regarding preliminary objections: -

**“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

**Writing separately in the said decision, Sir Charles Newbold, P, added that: -**

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”..”**

- 9. There is no doubt that the Galu Beach property is registered in the name of a company. The question then is whether that very fact is determinative of this matter, put differently, whether that very fact ousts the jurisdiction of the Family Court. In my view, the answer is negative. In arriving at the said conclusion, I am guided by the recent decision of the Court of Appeal in **GKW V RNK [2025] KECA 1475 (KLR)**, where it was held that the Family**

Court may lift the corporate veil to reveal the actual beneficial owners of a company. The court stated that:-

**“... and that limited liability companies, as was sought in this case, can be joined as parties in a suit relating to matrimonial properties between spouses- see Muthembwa v Muthembwa [2002] 1 EA 186; PWK v JKG [2015] eKLR and Lacheke Lubricants Ltd & Another v Chanandin & 4 Others [2023] KECA 1359. In this latter case, this Court stated: -**

**“In PWK v JKG (supra) this Court ...departed from the previous interpretation of Muthembwa v Muthembwa (supra) and the holding of the court in SNK v MNK (supra) that a trial court has no jurisdiction under section 17 of the MWP Act to distribute properties registered in the name of the company in which the spouses are the shareholders, due to the company’s separate legal personality. This is how the court reasoned: “With respect, we are not ourselves persuaded that Muthembwa v Muthembwa was to exactly that effect. Quite the opposite. The court there held, and we respectfully agree, that where the property of the company had been mixed with the matrimonial property, Section 17 allowed the court to deal with the parties’ respective interests in the company as injustice might otherwise result, which, to our way of thinking, is a repudiation, in appropriate cases, of the sometimes-unhelpful distinction between the parties as spouses as opposed to shareholders for purposes of section 17 proceedings. The Court in Muthembwa v Muthembwa**

found that section 17 of the MWPA did, in fact, allow a court to deal with the parties' respective interests in a company in which they are shareholders. We agree with that court's conclusion."

10. In this case, whether the property in Galu Beach was a matrimonial property, registered in the name of a company for whatever reason(s), is a contested matter of fact, which the court will have to determine upon hearing the parties on the merits, and not by way of a preliminary objection. In the circumstances, I do not agree with the respondent that a preliminary objection was rightly raised.
11. The upshot of the foregoing is that the preliminary objection has no merit. The same is dismissed. This being a matter between ex-spouses, I will not award costs.
12. Orders accordingly.

**Dated and signed in Mombasa, this 28<sup>th</sup> day of October 2025. Delivered**  
virtually through **Microsoft TEAMS.**

**Gregory Mutai**  
**JUDGE**

In the presence of: -

Ms Nyabanje, holding brief for Ms Kariuki, for the Claimant;

Ms Lynn Nganga, for the Respondent; and  
Arthur – Court Assistant.

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